

MEMORANDUM

To: REGIONAL DIRECTORS

FROM: John M. Daniel, Jr., P.E., DEE
Director, Air Programs Coordination

SUBJECT: Memo Number 00-1001. Incorporating State Toxics Requirements in Title V Permits

DATE: June 15, 2000

Copies: Regional Permit Managers
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On August 23, 1999 Judith Katz, Director of the Air Protection Division of EPA Region III, provided to DEQ a memo (Attachment "EPA memo") that clarified Region III's view on the federal enforceability of toxics conditions in our minor New Source Review (NSR) permits. This guidance memo is intended to help DEQ regional permit personnel incorporate the information from Ms. Katz's memo into minor NSR and Title V permit processing. Although implementation of these recommendations will require some changes to the approach and methodology we now apply to drafting Title V permits, this guidance was developed to minimize the effect on the issuance schedule of these permits.

SECTION I. BACKGROUND AND DEFINITION OF TERMS

State Toxics Program and Federal Enforceability

The EPA memo attempts to delineate the federal enforceability of state-regulated toxic pollutants. It is important to understand that when referring to our state toxics pollutants, EPA means 9 VAC 5-40 Article 3 and 9 VAC 5-50 Article 3 as well as the implementing policy, AQP-5.

One of the fundamental assumptions of this memo is explained in the first footnote of Page 1 of the enclosure, which states as follows:

The term "federal enforceable" refers to EPA's and citizens' ability to enforce a provision under sections 113, 167 and 304 of the Clean Air Act. Unless

otherwise noted, the use of the term in this enclosure does not relate to the ability of provisions to limit a source's "potential to emit".

Federal enforceability, within the context of this memo, has a specific meaning that is not to be interpreted as the same term used when discussing limits on potential to emit. This memo is directed at specifying those terms that EPA has authority to enforce in the legal sense. This use of the term "federally enforceable" includes those terms that meet the test of practical enforceability in order to limit a source's potential to emit, but also has a broader application. The May 20, 1999 STAPPA/ALAPCO letter from John Seitz puts it this way, "the term 'federally enforceable' has been used in the past in another context to identify a *smaller subset of provisions* [emphasis added] that may be used to limit a source's "potential-to-emit."

Applicability versus Enforceability

9 VAC 5-80-110 sub-section N. entitled "Federal enforceability" provides the basis for the "State-Only Enforceable" section of a permit as follows:

The board shall specifically designate as being only state-enforceable any terms and conditions included in the permit that are not required under the federal Clean Air Act or under any of its applicable federal requirements.

The regulations here require that DEQ designate what is only state-enforceable by specifying that permit terms and conditions not required under the Clean Air Act or by any of its applicable requirements shall be designated in Title V permits as "state enforceable". The basis for placing conditions that limit the emissions of toxic pollutants in this state-only section was the definition of "applicable federal requirements" which includes any standard provided for in the state implementation plan (SIP). Since the toxics rules were not incorporated in the SIP, the toxics conditions were assumed to fail the test for being federally enforceable conditions. This assumption is not consistent with the memo from EPA as discussed below.

EPA position on Minor NSR Permits and Permit Conditions Relating to State Toxics

Terms and conditions relating to state toxics contained in current and future minor NSR permits are federally enforceable and must be included in Title V permits. This means conditions limiting toxic pollutant emissions in minor NSR permits where the basis for the limitation is the state toxics regulations (9 VAC 5-50-160 et seq. and 9 VAC 5-40-160 et seq.), are federally enforceable in the sense that they can be enforced under sections 113, 167 and 304 of the Clean Air Act. These permit conditions are not necessarily federally enforceable from the perspective of limiting potential to emit and thereby keeping a source out of a MACT standard.

SECTION II. CHANGES TO CURRENT PERMITTING PROCEDURES

A memo from the Attorney General's Office dated February 8, 2000 (Attachment OAG memo and EPA response) states that DEQ has the authority to designate the state toxics regulations as "state-only" enforceable as they were intended to be under the minor NSR program. Currently Virginia has a regulatory action (known informally as Revision YY) in process to revise the minor NSR regulation that supports our permit program. We plan to include a provision in Revision YY that would exclude terms and conditions based on state-only applicable requirements from being federally enforceable. This will help to clarify DEQ's authority in this matter. Until EPA approves this revision we will use the following interim approach to the conditions based on state-only requirements in permits:

Issued Title V Permits:

Issued Title V permits that contain state toxics requirements in a state-only section will require that the Minor NSR permit be amended to include a state-only section. This section should include those terms and conditions related to the state toxics program. These amendments should be done on or before the renewal date of the Title V permit. The priority, however, will be to process pending permit applications. Those conditions relating to regulated pollutants should be handled on a case-by-case basis.

Title V Applications

When drafting the Title V permit the following options should be discussed if the source does not wish to have the state toxics requirements included in the federal section of their Title V permit:

Option 1: If the source wishes state toxics requirements to be "state-only" then it will be necessary to modify the Minor NSR permit through an administrative amendment to create a state-only section which contains the applicable state toxics conditions to include monitoring reporting and recordkeeping. Once completed these requirements can be placed in the state-only section of the Title V permit and the source will have all applicable requirements in one permit.

Option 2: If the source chooses not to have the state toxics requirements section in their Title V permit then the minor NSR permit should be amended to include a state-only section, making sure that monitoring, reporting and record-keeping requirements pertaining to state toxics are included in that section. The Minor NSR permit will remain active and will contain enforceable state toxics requirements.

It should be noted that designation of requirements as state-only enforceable does not prevent them from being potentially reviewed by EPA. In other words, the state-only section cannot act as a "permit shield" for any non state-only requirements that have been improperly designated.

Periodic Monitoring

With the option to include limitations on state toxics emissions in the federal section of the Title V permit comes the necessity to establish periodic monitoring for each of these conditions. Until revision YY is completed, the monitoring, reporting and record-keeping conditions that are currently established in the minor NSR permit will be used as periodic monitoring for state toxics. The basis for this is the April 17, 2000 federal court decision *Appalachian Power Company et al. v. EPA* which specifically says that states cannot use existing federal operating permit regulations to require more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency or requires only a one time test.

Minor NSR Permits with VOC /toxics limits

Minor NSR permits that limit state toxics through requirements reducing VOCs will need to have new conditions added to specifically address the state toxics regulations so that once incorporated into Title V they can be placed in the state-only section. This can be done as an administrative amendment to the permit since as it will not impose any additional requirements upon the source but just further clarify those terms and conditions already in the permit.

If you have any questions regarding this memo please contact Dan Grinnell in the Office of Air Permit Programs, telephone (804)698-4115 or e-mail Daniel T. Grinnell@aps@deq